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PRE-APPEAL BRIEF REQUEST FOR REVIEW

Docket Number (Optional): 101-P271/P3060US1

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)]

on _____

Signature _____

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Application Number	Filed
10/775,527	February 9, 2004

First Named Inventor: Jeffrey L. Robbin

Art Unit	Examiner
3695	Pollock, Gregory A.

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).
Note: No more than five (5) pages may be provided.

I am the

- ☐ applicant/inventor.
- ☐ assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)
- ☑ attorney or agent of record. Registration number 32947.
- ☐ attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____

/C. Douglass Thomas/
Signature

C. Douglass Thomas
Typed or printed name

408-955-0535
Telephone number

September 7, 2010
Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.

☐ *Total of _____ forms are submitted.

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. **SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.**

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Robbin	Attorney Docket No.: 101-P271/P3060US1
Application No.: 10/775,527	Examiner: Pollock, Gregory A.
Filed: February 9, 2004	Group: 3695
Title: Network-Based Purchase and Distribution of Media in Accordance with Priorities	Confirmation No. 1033

PRE-APPEAL BRIEF AND REQUEST FOR REVIEW

Mail Stop Amendment
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Applicant requests review of the Final Rejection dated June 8, 2010 in the above-identified application. This request is being filed with a Notice of Appeal. The review is requested for the reasons stated below.

Claims 1-3, 5, 6, 9, 11-16, 19 and 22-24 remain pending. Reconsideration of the application is respectfully requested based on the following remarks.

Rejection of Claim 22 under 35 USC § 112, Second Paragraph

In the Office Action, the Examiner rejected claim 22 under 35 U.S.C. §112, second paragraph, as being indefinite. Claim 22 has been cancelled to obviate the Examiner's concerns and render the rejection under 35 U.S.C. §112, second paragraph, moot.

Patentability of Claims

In the Office Action, the Examiner rejected claims 1-3, 5, 6, 9, 11-16, 19 and 23 under 35 U.S.C. §103(a) as being unpatentable over Santoro et al., US Patent Publication 20030020671 (hereafter "Santoro et al."), in view of Homer at al., US Patent

Publication 2002/0042730 A1 (hereafter "Homer et al."); and rejected claims 22 and 24 under 35 U.S.C. §103(a) as being unpatentable over Santoro et al. in view of Nieh et al., "The Design, Implementation and Evaluation of SMART: A Scheduler for Multimedia Applications," Proceedings of the Sixteenth ACM Symposium on Operating Systems Principles, October 1997 (hereafter "Nieh et al."). These rejections are fully traversed below.

Claim 1 pertains to a "method of managing tasks performed within a single client media player application program stored on a computer readable medium and running at the application level on a computer coupled over a network to a network-based media server." Among other things, claim 1 recites:

> coordinating ... performance of the activated operations at the client media player application program in accordance with priority levels associated with the different media-based actions of the tasks, each of the different media-based actions having a different intra-application priority level, the priority levels of the different media-based actions being user-modifiable based on user interaction with the client media player application program.

As to such recited different intra-application priority levels, the Examiner relies on portions of Santoro et al. which concern priorities, i.e., refresh priorities, for tiles of a graphical user interface organized as a grid.

Refresh priorities for tiles of a graphical user interface organized as a grid are not different intra-application priority levels for different media-based actions supported by a client media player application program. While Santoro et al. supports priorities for tiles in its grid, its priorities are amongst its tiles. The rejection in the Office Action improperly equates the URL loader 1510 of Santoro et al. to the client media player application program recited in claim 1. However, the URL loader 1510 cannot correspond to the client media player application program of claim 1. According to para. [0119] of Santoro et al. the "URL loader 1510 decides whether content should be obtained afresh by contacting the connection manager 1512, or from content previously stored in cache."

The Examiner argues at page 10 of the final Office Action that the URL loader 1510 is an application program since "[t]he URL loader is not part of the operating

system…." This is not correct. Each tile is separate and assigned to "a data stream or application program." (e.g., Santoro et al., para. [0088]). Further, para. [0089] of Santoto et al. states: "Each tile is separately associated with a series of information, for example, an application program, database or file…." Consequently, in contrast to claim 1, there is no reasonable basis to conclude that the URI loader 1510 is a client media player application program, let alone a client media player application program in which different intra-application priority levels are assigned to different media-based actions supported by the client media player application program. At best, Santoro et al. teaches that each tile is separate and pertains to a distinct data stream or application program. As such, any priorities to tiles are not intra-application priorities for different media-based actions supported by a client media player application program as recited in claim 1.

In addition, the priority levels recited in claim 1 are for different media-based actions and are user-modifiable. More particularly, claim 1 recites "the priority levels of the different media-based actions being user-modifiable based on user interaction with the client media player application program." On page 6 of the Office Action, the Examiner makes reference to paragraphs [0064], [0089], [0101], [0112], [0166] of Santoto et al. However, these referenced paragraphs are, at best, concerned with refresh or retrieval rates for tiles. **As such, these refresh or retrieval rates in Santoro et al. are not for "different media-based actions" that are assigned different priority levels based on user interaction with a client media player application program as recited in claim 1.**

Hence, it is submitted that Santoro et al. clearly does not teach or suggest modifying priority levels for different media-based actions by user interaction with a client media player program. Instead, priorities for tiles in Santoro et al. are primarily set by the grid itself based on type of data or level in grid's hierarchy. Formally, Santoro et al. expresses this in para. [0090] which states:

> The grid assigns a priority to a tile based upon the identifier, or based upon the type of data that the source of the information comprises. Where tiles are ranked into levels, the grid assigns an information source to a tile in a level that is appropriate for the type of data or the identifier associated with the information source. In

> this way, a tile can be automatically given a priority that is appropriate for the type of information that it is to display.

Any mention of user preferences or user specified rates (i.e., retrieval rates, refresh rates) in Santoro et al. is not taught or suggested as being for different media-based actions of a client media player application program. Clearly, Santoro et al. is unable to teach or suggest user-modifiable priorities of different media-based actions of a client media player program as recited in claim 1. As such, any priorities to tiles are not intra-application priorities as recited in claim 1.

Homer et al. pertains to a rechargeable media distribution and play system. Homer et al. was combined with Santoro et al. on page 6 of the Office Action only for teaching "media-based actions". Applicants submit, notwithstanding the Examiner's assertion to the contrary, that there is no reasonable rationale why anyone skilled in the art would reasonably seek to combine Homer et al. with Santoro et al. "A factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of argument reliant upon ex post reasoning." *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 USPQ2d 1385, 1397 (2007). However, even if Homer et al. were to be combined with Santoro et al., Homer et al. would not be able to overcome the serious deficiencies of Santoro et al.

Accordingly, for at least the reasons noted above, it is respectfully submitted that claim 1 is patentably distinct from Santoro et al., alone or in combination with Homer et al. In addition, claim 11 pertains to a computer readable medium that can operate similar to the method discussed above regarding claim 1. As such, for at least reasons similar to those noted above with respect to claim 1, it is submitted that claim 11 is also patentably distinct from Santoro et al., alone or in combination with Homer et al.

Still further, claim 23 pertains to a computer for presenting media to its user. The computer includes a single client media application program operable to enable the user to play, browse, preview, purchase, download and present media items for the benefit of the user. A task manager "manages performance of at least browse, preview, purchase and download operations by assigning user-modifiable priority levels to each of the browse, preview, purchase and download operations, and managing performance of the browse, preview, purchase and download operations in accordance with the assigned

user-modifiable priority levels." In claim 23, a client media application operates in view of user-modifiable priorities levels assigned to each of the browse, preview, purchase and download operations. Hence, for at least some of the reasons similar to those noted above, it is submitted that claim 23 is also patentably distinct from Santoro et al., alone or in combination with Homer et al.

Based on the foregoing, it is submitted that claims 1, 11 and 23 are patentably distinct from Santoro et al., alone or in combination with Homer et al. Additional limitations recited in the independent claims or the dependent claims are not further discussed because the limitations discussed above are sufficient to distinguish the claimed invention from Santoro et al., alone or in combination with Homer et al. and/or Nieh et al.

Summary

It is submitted that claims 1-3, 5, 6, 9, 11-16, 19 and 22-24 are patentably distinct from Santoro et al. in view of Homer et al. and/or Nieh et al. It is respectfully requested that the rejections under 35 USC §103(a) be withdrawn. Reconsideration of the application and an early Notice of Allowance are earnestly solicited.

Applicants hereby petition for an extension of time that may be required to maintain the pendency of this case, and any required fee for such extension or any further fee required in connection with the filing of this Amendment is to be charged to Deposit Account No. 504298 (Order No. 101-P271).

I am the attorney or agent acting under 37 CFR 1.34

Respectfully submitted,

/C. Douglass Thomas/

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